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LAW-DECREE 14/2019, CONSTRAINING AUTONOMOUS COMMUNITIES' USE OF DIGITAL AND ELECTRONIC TOOLS AND INCREASING ADMINISTRATIVE CONTROL OF OPINION AND INFORMATION ON COMMUNICATION NETWORKS*

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Abstract

This paper analyses the modifications to our legal system contained in Law-decree 14/2019 and its problems in terms of legal issues and opportunity. It specifically analyses doubts regarding its constitutionality due to the lack of "extraordinary and urgent need" for the regulation, but also because it possibly affects the exercising of fundamental rights such as freedom of expression and information in the digital environment as a consequence of the new control powers given to the public authorities. It also studies the restrictions imposed on the autonomous communities concerning the use of certain digitals tools and explains its doubtful constitutionality based on the traditional case law of the Constitutional Court, which was recently reiterated, concerning the guaranteed scope of autonomy regarding the choice of electronic procedural instruments as a self-organisation tool.

Key words: administrative law; freedom of expression; internet; digital gag; electronic administration; distribution of powers; law-decree.

EL REIAL DECRET LLEI 14/2019, EL CONSTRENYIMENT DE LES COMUNITATS AUTÒNOMES EN MATÈRIA D'UTILITZACIÓ D'EINES DIGITALS I ELECTRÒNIQUES I L'INCREMENT DEL CONTROL ADMINISTRATIU DE L'OPINIÓ I DE LA INFORMACIÓ EN XARXES

Resum

El present treball analitza les modificacions del nostre ordenament jurídic contingudes al Reial decret llei 14/2019 i els seus problemes tant jurídics com d'oportunitat. En concret, s'hi analitzen els dubtes de constitucionalitat per la manca de la "necessitat extraordinària i urgent" de la regulació, però també la possible afectació a l'exercici de drets fonamentals com ara les llibertats d'expressió i informació en l'àmbit digital com a conseqüència de les noves facultats de control que es reconeixen a l'Administració. Així mateix, s'estudien les restriccions imposades a les comunitats autònomes pel que fa a la utilització de determinades eines digitals i s'exposa la seua dubtosa constitucionalitat a partir de la jurisprudència tradicional del Tribunal Constitucional, recentment reiterada, sobre l'àmbit d'autonomia garantida pel que fa a la tria d'instruments electrònics de procediment com a eina d'autoorganització.

Paraules clau: dret administratiu; llibertat d'expressió; Internet; mordassa digital; administració electrònica; distribució de competències; decret llei.

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Summary

1 Context and conditions for the passing of Law-decree 14/2019

Law-decree 14/2019 of 31 October,[1] adopting urgent public security measures in digital administration, public sector procurement and telecommunications (*Real Decreto-ley 14/2019, de 31 de octubre, por el que se adoptan medidas urgentes por razones de seguridad pública en materia de administración digital, contratación del sector público y telecomunicaciones*), was subsequently ratified by the Permanent Deputation of the Congress of Deputies on 27 November 2019 with a large majority, being voted for by the Partido Socialista (PSOE), Partido Popular (PP) and Ciudadanos (Cs) political parties.[2] In the text that was passed one can see the evolution of some structural elements of our administrative law. It was passed with broad consensus despite it being a time of major political fragmentation and in the midst of a complex electoral and political context. The bill was mainly opposed by non-nationwide political parties. Two autonomous governments have even lodged appeals based on unconstitutionality. The Government of Catalonia was the first to do this, following Opinion 6/2019 of the Council for Statutory Guarantees of Catalonia, a consultative body for this matter in this autonomous community. The Council was highly critical of several formal and material aspects of Law-decree 14/2019. It was followed by the executive in the Basque Country. At the time of writing and reviewing this paper, the Constitutional Court (*Tribunal Constitucional* - TC) had not yet handed down a ruling allowing us to confirm whether any of these criticisms, not only political but also legal, are considered to have sufficient grounds to make the text wholly or partly unconstitutional.

Analysis that sets aside political considerations that may explain the origin of the legal reform and focuses on the legal issues reveals two elements that have been the target of criticism. On the one hand, the central government has slowly but surely used basic legislation concerning administrative procedure and the common framework for public administrations when aspects concerning digitalisation or electronic transformation are involved in order to centralise powers and take away some of the margin for organisational autonomy that the autonomous governments had hitherto enjoyed. This is a trend that was already evident in the recent reform of the administrative procedure in 2015, for example. This even had to be qualified by the Constitutional Court in its important Judgment 55/2018,[3] limiting the State Administration's ability to control and re-centralise, which Additional Provision two of Spanish Law 39/2015 put in the hands of the central government. This is again present in Law-decree 14/2019. On the other hand, the legislator (although in this case it is the executive branch acting as a legislator) is granting the public authorities increasing control powers to inspect and monitor the activities of the public when they make use of digital resources, very notably increasing public supervisory powers and authority. These go beyond those which are commonly found in more traditional communication environments, when operating in those spheres.

In this paper we will seek to explain, based on strictly legal analysis, the exact scope of the modifications made through the Law-decree and its consequences for the model of territorial distribution of power in its most bureaucratic and administrative sense. Likewise, we will also deal with what could be seen as some of the legal problems in the law, specifically those that have to do with doubts concerning its constitutionality, either for reasons of form or powers (absence of an extraordinary and urgent need authorising the legislative branch to legislate in cases such as this) or due to the material contents of a law that raises doubts about the disproportionate restriction of rights and freedoms it allows the public authorities to perform, redrawing the framework for relations between the autonomous administrations and the State Administration.

2 The more than questionable extraordinary and urgent need for the contents in Law-decree 14/2019

Although Constitutional Court case law has been somewhat more demanding of late, traditionally it has been very soft in controlling the requirement for extraordinary and urgent need, whereby article 86.1 of the

1 Published in the Official State Gazette (*Boletín Oficial del Estado* - BOE) on 5 November 2020.

2 Unidas Podemos (UP) ultimately decided to abstain, while parties such as Esquerra Republicana de Catalunya (ERC), Partido Nacionalista Vasco (PNV) and Compromís, all of which provided parliamentary support before and after the elections in November 2019, voted against the bill. It was also opposed, for other reasons, by the VOX Parliamentary group (*Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente* [The Journal of Debates of Plenary Sittings of Congress, of the Permanent Deputation and of Committes], year 2019, XIII, legislature no. 14, p. 71).

3 BOE of 22 June 2020.

Spanish Constitution of 1978 (CE) allows the executive to issue rules with the status of law (defined as *lax* by both Duque Villanueva (2018: 223-224) and Carmona Contreras (2018: 1280-1282), who has written that the premise authorising decrees-law in Spain has been consistently timid. There were no effective cases of control until Constitutional Court Judgment 68/2007 and much understanding of the justifications for the need in subsequent case law, particularly regarding omnibus decrees-law that include diverse content. One example is Constitutional Court Judgment 199/2015. Cotino Hueso (2020: 14-15) has recently reviewed the latest constitutional case law concerning the matter in the recent Constitutional Court Judgments 14/2020, 61/2018 and 152/2017, which take a similar view. However, even in these most recent judgments to which we have referred, occasional mention has been made of the incumbent government's consideration that the requirement has been met. The reproval in these decisions has been more symbolic than anything else, since they always arrive long after Parliament has ratified the law-decree or it has been heard in Parliament as a law and all of its effects have already expired and been completed. It is probably for this reason that the use of decrees-law in Spain is growing to the extent that it could be considered out of control. This trend has increased even more in recent times with the COVID-19 pandemic in 2020. In any case, as a preliminary consideration to understand the problems with Law-decree 14/2019, it is worth reminding ourselves of this structural problem and the consequences it has had, encouraging growing use of this regulatory tool (regarding this question see Boix Palop (2012: 125-131) who took an initial quantitative approach; subsequently, a more complete approach was taken by Martín Rebollo (2015) and, especially, Sanz Gómez (2020) who performed a more exhaustive calculation that demonstrates the serious problem and abuse of such legislation). This partly explains the deficiencies in the law we are analysing here.

Indeed, given this *lax* constitutional case law, it should come as no surprise that Law-decree 14/2019 is once again an example of a legal rule emanating from the government in which the constitutional justification for its supposedly extraordinary and urgent need is hard to detect. In fact, the problem of shortcomings in this aspect in enforcing control of constitutionality is patent in the fact that the government does not even feel obliged to provide the least explanation with regard to this specific law. None of the references in the preamble to the needs of contemporary society and the regulatory modifications that are appropriate to adapt them to the digital sphere, such as tackling risks based on that stipulated in Spanish Law 36/2015 on National Security and the importance of completing the National Security Strategy 2017, approved by Law-decree 1008/2017, concerning cyber-threats or problems associated with technological development, explains the reasons why the regulations contained in Law-decree 14/2019 are not only necessary but also extraordinarily necessary, as well as urgent, or why it was not possible to pass it together with those prior regulatory instruments or simply through ordinary legislative procedure. In this sense, the TC has traditionally accepted situations of *relative* need (Duque Villanueva, 2018: 224), even accepting such need when the legislation is necessary in order to meet objectives in the government's programme that require immediate regulatory action (Constitutional Court Judgments 6/1983 and 111/1983), while a non-arbitrary inference of urgency, without the need to clearly state the reasons why is not possible to use ordinary legislative procedure, has been understood as sufficient justification (Carmona Contreras, 2018: 1281, mentioning Constitutional Court Judgments 31/2011, 137/2011, 93/2015, 126/2016 and 169/2016).

In the case we are analysing here, the only attempt to justify the urgency of the regulation is in the following paragraph:

> "The recent and serious events that have occurred in part of the Spanish territory have highlighted the need to modify the current legislative framework to deal with the situation. Such facts demand an immediate response to prevent the recurrence of such events by establishing a preventive framework for that purpose. The ultimate objective of this is to protect the constitutionally recognised rights and freedoms and guarantee public security for all citizens."

Although it does not explicitly say so, it appears evident, at least from the statements by the members of the executive when they presented the regulatory modification, [4] that the objective of the Law-decree

4 See the press release from the Cabinet meeting on the Spanish Government's website. However, this press release also makes no explicit reference to the situation in Catalonia, past or present, in particular to the possibility of the Government of Catalonia being able to progress with creating digital resources to create the seed of a possible future Catalan Digital Republic. Nevertheless, we can see that in that Cabinet meeting reference was made to decisions challenging various resolutions of the Government of Catalonia and the Parliament of Catalonia in both the ordinary courts and the Constitutional Court. This makes clear the framework of institutional

was to prevent the so-called *Catalan Digital Republic.* As stated during the parliamentary debate when the regulation was being heard,[5] it was a reaction to "[the] recent and serious events that have occurred in part of Spanish territory", referring to the confrontation between the Government of Catalonia and the Government of the Kingdom of Spain arising from the desire to hold a referendum on self-determination and, in the event of holding one, to implement or not implement the relevant effects. This situation led to the consultation unilaterally organised by the Government of Catalonia on 1 October 2017, which the Spanish government tried to prevent through every means (concerning this conflict, see the special edition of *El Cronista del Estado Social y Democrático de Derecho* of October 2017, which contains a complete timeline of the events leading up to the consultation date). Despite the Spanish government and its legal apparatus having voided all the decisions taken, it was not able to prevent voting (although it forced voting to take place without sufficient guarantees) or counting of the votes. This was partly attributed to its inability to control, *ex ante*, the use of certain electronic administrative tools available to the Catalan autonomous authorities.

It is precisely these risks and possibilities of action that the regulation is seeking to contain. The need to which the paragraph in question refers, albeit insufficiently, is not entirely explained and, therefore, is inadequate. If the regulation does indeed seek to tackle the problems briefly set out, the reference made in the quoted paragraph is not sufficient. To start with, it should have explained what the "recent and serious events that have occurred in part of the Spanish territory" were, as succinctly set out in this paper, for example. In addition, we could expect it to state the reason why these events are considered so serious that they require a regulation dealing with them through the specific measures it contains. Indeed, it is not clearly understandable and at no time does the regulation make the least effort to explain what the situation described has to do with the need to prohibit the use of certain IT tools—such as those based on what is known as blockchain (Legerén-Molina, 2019: 197-208)—to restrict the use of cloud storage by public administrations in certain cases or to limit the autonomy of all public administrations other than the central government with regard to possibilities of using digital signature. None of these tools or possibilities appears to have caused conflict or been problematic in the past; it has been normal for many public administrations to use them. Regarding this point, one should remember that need for the measures is not sufficient justification by itself: article 86.1 CE stipulates that, in addition, there must be exceptionality and urgency in the need. These elements are absent from the justification in the Law-decree, based on the aforementioned constitutional case law. However, it must be said that even in a minimal analysis based on a requirement for a sense of urgency that simply does not imply arbitrariness, which has been the constitutional guideline, it is simplistic to accept that the events of 2017 caused sudden urgency in 2019, two years later, when during all that time a reform with these contents had not even begun. Not even the need for the immediate effect of the regulation is duly justified, which is the most common justification (de Vega García, 1990: 269-270). It is highly doubtful whether a reform such as that being analysed is constitutionally authorised if it comes in response to events from years ago and there is no new situation that explains why a new need has arisen. In any case, the regulation would have to set that out, which it also does not do.

None of this is in the Law-decree, which prevents us, on the one hand, from deeming it duly justified that this extraordinary and urgent need exists. And, furthermore, on the other hand, the absence of an explanation of the risks it is seeking to combat, the lack of references to what they consist of and the non-existent explanation of the reasons why the regulations approved by the government in Law-decree 14/2019 would be an appropriate response prevents us from performing the least assessment of its possible or potential usefulness in tackling them. For all of these reasons, this must be considered a regulation that does not abide by the constitutional framework for allowing and granting exceptional constitutional authorisation to the government to pass regulations with the status of law through decrees-law. In spite of the fact that we have become accustomed to this hypertrophy of ordinary legislative activity through decrees-law (during the last legislature in particular, there was constant recourse to this instrument), one should note that this is a constitutional anomaly and an abuse that must be duly criticised whenever it takes place. This is a further example of this and a most outrageous one at that. The same view is, in fact, held by a large group of jurists who, employing similar arguments to those set out here, have unsuccessfully requested the Spanish

conflict in which Law-decree 14/2019 was passed. Moreover, a simple search using any search engine allows one to find numerous statements by members of the government on the internet that point to this explanation for the measure.

5 *Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente* [The Journal of Debates of Plenary Sittings of Congress, of the Permanent Deputation and of Committes], year 2019, XIII, legislature no. 14, pp. 13-30.

Ombudsman to lodge an appeal based on unconstitutionality. It is also the view taken in Opinion 6/2019 of the Council for Statutory Guarantees of Catalonia (Legal Ground two), as well as part of doctrine (Cotino Hueso, 2020: 15-16).

If we go beyond strict analysis of need as an authorising clause and incorporate the dimension of the proportionality of the approved measures, while such explanations are lacking there are also very clear limitations of rights and excesses in the control powers granted to the public authorities, which we will analyse below. This has consequences for the analysis, which no longer concerns the form and the authorisation to issue the regulation, but instead concerns its material contents and the constitutionality of those restrictions of fundamental rights. We will thus now analyse whether Law-decree 14/2019 contains disproportionate limitations of some rights and freedoms of all citizens, on the one hand, or excessive restrictions, beyond those permitted by the Constitution, on the capacity for autonomous organisation of territorial public administrations, on the other.

3 Limitations on the public authorities' possibilities for self-organisation

As mentioned above, an essential part of Law-decree 14/2019 has to do with the central government's desire to limit the possibilities of other public administrations using a series of instruments or tools, both technological and legal, which they had hitherto enjoyed and had been able to use without major problems. Essentially, we are dealing with measures that make it compulsory to use the electronic ID card, in an exclusive and excluding manner, as a document to accredit the digital identity of citizens, that prohibit Spanish public administrations from using distributed ledger technology (blockchain) and that prohibit the use of cloud-based digital storage services in servers based outside of the EU (Alamillo Domingo, 2019). All three of these appear to be strongly connected to the fact that the central government fears that these instruments may be used, or that they already are being used, by the independence movements (although, as we have said, any explanation or even minimal details concerning this are missing from the explanation of the urgent need for the regulation). However, what cannot be understood (and it appears that Law-decree 14/2019 does not provide the slightest justification for this) is why this fact should justify the introduction of restrictions that affect all public administrations conducting any activity, instead of prohibiting only their illicit use or establishing controls that hinder the misuse of these tools, almost completely limiting the possibility of using them in certain cases.

3.1 The desire to convert the digital ID card into the only legally valid means of digital identification and electronic signature

With regard to the digital ID card, article 1 of the Law-decree amends Organic Law 4/2015 on the protection of public safety clearly stipulating that only the national ID card, in an exclusive and excluding sense, is a sufficient and suitable form of proof of the identity and personal data of its holder for all purposes. In this sense, it is established that henceforth:

> Article 8.1 Organic Law 4/2015: "[...] The National Identity Document is a public and official document and will enjoy the protection granted to such documents by law. It is the only document with sufficient value, by itself, to prove the identity and personal data of its holder for all purposes."

Coherently, article 2 of the Law-decree also amends Spanish Law 59/2003 on Electronic Signatures in the same way, although without an equivalent express statement that it is "the only document with sufficient value by itself" to be able to prove the holder's identity. However, it does state, through the use of the aforementioned article, that it is considered, even in the private sphere and in civil or commercial legal business, that in legal terms the digital ID card is the document that digitally proves the holder's identity:

> Article 15.1 of Law 59/2003: "The electronic national identity document is the national identity document that electronically proves the personal identity of its holder in the terms stipulated in article 8 of Organic Law 4/2015 of 30 March on the protection of public safety, and allows electronic signing of documents".

This regulation is surprising to say the least since, in principle, Spanish Law 39/2015 on the Common Administrative Procedure for Public Administrations (LPAC), the basic regulation of the administrative

procedure applicable to all public administrations, containing that which, moreover, had been the traditional regulation in force in Spain at least since the Spanish Law on Citizens' Electronic Access to Public Services of 2007, just four years previously, had accepted other tools and instruments as means of identification (art. 9) and signature (art. 10) (Martín Delgado, 2010; Boix Palop, 2019: 344-345), including not only electronic certificates but even registration or username and password systems that each administration, depending on the case, could determine. It guaranteed possibilities of identifying citizens before the public administrations that went far further than that sought by the 2019 reform (Alamillo Domingo, 2016a, 108-114, and 2016b), abandoning a strategy previously too centred on identification through the electronic ID card that was unanimously considered, by both practitioners and by doctrine, as an unnecessary obstacle (Martín Delgado, 2016: 263-267).

In an effort to resolve, at least in part, this legal paradox that makes forms of identification that would be acceptable in administrative procedure apparently no longer acceptable in private legal business or for the purposes of digital identification for public security purposes, Law-decree 14/2019 does modify a point in the LPAC concerning these issues. Thus, although it accepts that public administrations may continue to determine their own identification systems, this is subject to a new system of prior authorisation by the General State Administration for all systems that are different to electronic certificates or stamps. In any case, it must be said this modification does not ultimately resolve the aforementioned paradox: even with this state authorisation it is still possible to prove one's identity before all Spanish public administrations with mechanisms different and alternative to the digital ID card. On the one hand, it is possible through all procedures that so allow and were approved and regulated prior to the regulation's entry into force. On the other hand, it may be performed through procedures that may be added in the future and have the now compulsory state authorisation. The text of article 9 LPAC (the reform of article 10 is practically identical) is thus now as follows in the first paragraph of point 2 c):

> Art. 9.2 c) LPAC: "Concerted key systems and any other system that the administration has considered valid in the terms and conditions established, provided they are previously registered as a user, making it possible to guarantee their identity, with prior authorisation from the Secretariat General of Digital Administration at the Ministry of Territorial Policy and Civil Service, which may only be denied for reasons of public security with a prior binding report from the Secretariat of State for Security at the Ministry of the Interior. The authorisation must be issued within a maximum of three months. Notwithstanding the General State Administration's obligation to reach a decision by that deadline, failure to decide on the authorisation request will be deemed to have the effect of rejecting the request".

Apart from the peculiar situation, which needs no further mention, of having a law-decree regulate electronic signature and identification systems (Alamillo Domingo, 2019) in a supposed situation of extraordinary urgency, it is not understandable why there is a need to establish regulations that, if they are generally applicable, go against the basic state regulation concerning administrative procedure and should have repealed or modified it in order to eliminate these options (which is not the case) or if, on to the contrary, they are deemed to be regulations only for particular situations in which there is a specific legal requirement to exclusively prove identity with all certainty, then they would seem superfluous with regard to their pretensions to exclusivity (as the only means of digital identification).

In addition, it must be said that, in light of the traditional interpretation of the autonomy of local bodies and, in particular, the autonomous communities, and that recently stated in Constitutional Court Judgment 55/2018, for example, concerning a prior authorisation model very similar to the one introduced here, which Spanish Law 39/2015 envisages in Additional Provision two and which the judgment requires to be interpreted in a manner that removes its authorising content, it is very possible that this prior authorisation requirement will also be deemed contrary to the principle of autonomy recognised by the Constitution. Indeed, the Constitutional Court has explicitly stated the following (in Legal Ground 11 of said Constitutional Court Judgment 55/2018 and especially in points *d* and *e*):

> Constitutional Court Judgment Legal Ground 11: "[…]
>
> e) Additional Provision two, in accordance with the stated interpretation, contradicts the general criterion according to which the General State Administration does not control the activity of the autonomous communities, except in the forms and with the conditions specifically stipulated in the Constitution. In the

> same way as the autonomous communities' political autonomy prevents the obtaining of certain credits being conditional upon submission of justifications to a ministry (Constitutional Court Judgment 63/1986 of 21 May, Legal Ground 9), in principle it also prevents the creation or maintenance of electronic platforms being conditional upon submission to a ministry of a justification in terms of efficiency.
>
> […] In short, although the purpose of the disputed provision is perfectly legitimate (making the limitation on electronic resources in all public administrations compatible with the requirements of efficiency (art. 32.1 CE) and budgetary stability (art. 135 CE), the instrument used, in accordance with the interpretation set out, would not be: an intervention by the central administration in fundamental organisational decisions of the autonomous communities, which is not envisaged in the Constitution, cannot be classified as a due, necessary and proportionate coordination measure. This indeterminate administrative control places autonomous and local political bodies in a situation of hierarchical dependence on the central government."

This quote is long but, in my opinion, very pertinent because the identical reason for the control mechanism envisaged in Additional Provision two of the LPAC regarding the decisions by local or autonomous community bodies on how to implement their technological procedural solutions and how to analyse and control their best efficiency is strictly equivalent, if not identical, to the position of control in which the new articles 9 and 10 LPAC place the State Administration with regard to the rest of the public sector when determining whether their organisational decisions to allow other possibilities of identification and electronic signature before public administrations are adequate or not.

For these reasons, one can state that these provisions, by incorporating prior control with these characteristics over self-organisation decisions by the autonomous communities, exercised by a body of the Government of Spain, the Secretariat General of Digital Administration, must be considered unconstitutional, in a similar way to that argued in Opinion 6/2019 of the Council for Statutory Guarantees of Catalonia (Legal Ground three), which considers them to be a clear invasion of their powers. Not even cybersecurity considerations should alter this conclusion because, as stated by the Constitutional Court itself (Constitutional Court Judgment 142/2018) and as very transparently explained by Alamillo Domingo (2019), the implementation and control of the National Security Scheme (*Esquema Nacional de Seguridad* - ENS) falls within the powers of the public administration responsible for the various services managed in the performance of its powers, notwithstanding the coordination powers that the Government of Spain or other bodies in the central administration may hold (Fondevila Antolín, 2016).

In this case, we are dealing with a mechanism that works exactly the same as that which gave rise to Constitutional Court Judgment 55/2018, with a State Administration that is seeking to establish itself as the controller of the correctness of other public administrations' actions with regard to decisions on strictly internal organisational questions that are perfectly possible within the model approved in the basic legislation. In fact, as proof that they are perfectly possible, the State Administration has them at its disposal without any external control or need to explain its organisational reasons to other powers. The fact that it is intended that autonomous and local administrations, on the other hand, have to justify this option is a clear manifestation of differentiated and subordinate treatment that does not fit well with the constitutional notion of autonomy and the consideration that the basic regulation, by definition, must treat all public administrations in the same way.

Lastly, it should be noted that this reform does not only pose additional complications for autonomous communities or local bodies; all public administrations other than the State Administration are affected. In fact, some of these have a very regular and constant relationship with users and the public and due to this close relationship (for example, public universities and their relationships with their students), have for years made widespread use of procedures in which identification and signature can be performed simply with username and password systems or similar. There is a considerable number of procedures and more are appearing and being constantly redesigned. From the entry into force of this amendment to the LPAC, it will be necessary to overcome an additional procedural hurdle at least every time a new procedure is intended to be established with these systems of identification and signature.

3.2 Restrictions on databases and cloud storage based outside the European Union

Similar perplexities appear in relation to articles 3 and 4 of Law-decree with regard to the new rules and restrictions concerning the location of databases and data assigned by the public administrations. These have supposedly been issued in order to ensure the best security of these activities. They are also added to articles 9 and 10 LPAC with matching provisions in this regard:

> Article 9.3 LPAC: "In relation to the identification systems envisaged in paragraph c) of the previous section, it is compulsory for the necessary technical resources for the collection, storage, processing and management of said systems to be located in European Union territory. In the case of the special data categories referred to in article 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, they must be based in Spanish territory. In any case, the data shall be available for access by the competent judicial and administrative authorities."

As is well-known, because the Government of Spain announced it very emphatically, the idea behind the reform is to prohibit the contracting of servers or cloud storage services in countries outside the European Union or with which the European authorities have not established that they have an equivalent level of security and guarantees. The text finally approved is totally consistent with this intention and includes an explicit prohibition on the use of such servers outside of such situations. The measure does not pose the legal problems we have mentioned above concerning the provisions on identification and signature by the public, because it does not differentiate between territorial or institutional administrations. On the contrary, it is intended to generally apply to the entire public sector. It also does not contradict any other rule in our legal system. However, it does create significant problems with its application, more than anything because nowadays there are many cloud storage tools that the public authorities have contracted with private sector companies, which are usually global multinationals that are not accustomed to dealing with regulations in which there is a restriction such as the one introduced by Law-decree 14/2019, so it is likely that they have their servers and storage systems spread around the world due to various economic and regulatory circumstances, but not in accordance with this new concern in the new rule approved in Spain. This would force them always to have servers, for the moment at least, in countries that are probably not the most economical places to perform these activities globally.

The fact is that today, the European certification process required by the regulation in order to be able to accept cloud or physical storage outside of Spanish or European territory has not been fully implemented. A strict and literal interpretation of the law requires public administrations to stop using servers or storage services based outside of the European Union. The new article 46 bis introduced into Spanish Law 40/2015 by article 4 of the Law-decree, on the other hand, makes matters worse by extending the prohibition even to holding databases in countries outside of the European area. In addition (with some exceptions), there may not be transfers of data to a third country or international organisation, even for service organisation reasons, which, in view of the economic context and usual structure of the provision of digital services in the world of telecommunications and the offer of electronic tools, if the regulation is interpreted literally and strictly (and if there is a true desire for control by the State Administration), could require a large number of contracts currently in force to be changed without there being an understandable explanation as to what justifies this change without defective functioning having been detected so far or problems having been caused that may justify the prohibition. As far as we are currently aware, there is also no relationship with alleged problems in this regard that may have been caused by the intention to set up a supposed Catalan Digital Republic.

In addition, rounding off the regulation in a manner that, again, questions its respect for the principle of institutional autonomy, article 4 of the Law-decree once again grants the State Administration exceptional control tools through a new wording of article 155 of Spanish Law 40/2015, which will henceforth exceptionally allow the central government to intervene and suspend the transfer of data by other public administrations in the event of breach of these provisions for reasons of national security. It may be that this reference to national security may justify such exceptional treatment, although it is vague and would have to be further developed. However, it must be said that the reflections set out above concerning the principle of autonomy and non-subordinate relationships between autonomous communities or local administrations and the State Administration fully apply. Any exception to the principle of non-control of the former by

the latter must be properly justified such that, in normal circumstances, when there is any breach, the latter would have to challenge the disputed actions of other administrations in the administrative courts. This is stated in the aforementioned Constitutional Court Judgment 55/2018. It is the normal and ordinary procedure for controlling legality in the hands of the State Administration, without calling into question institutional guarantees such as local autonomy (Baño León, 1988: 165-173; Parejo Alfonso, 2011: 145-154) or, more directly, the principle of autonomy applicable to the autonomous communities.

3.3 Limitations on the use of blockchain by public administrations

In order to complete the list of new limitations introduced by the reform, we must mention article 3 of Law-decree 14/2019, which introduces a temporary prohibition on the use of distributed ledger technologies (such as the well-known blockchain) through a new Additional Provision, number six, in the LPAC. This currently strictly prohibits their use for identification purposes in relations between public administrations and the public until a European regulation has been passed concerning the matter. At the time when this rule was passed, such a regulation simply did not exist, which brought any such initiative in this field to a halt, and as of now no such regulation has been completed.

> Additional Provision 6 LPAC: "1. Notwithstanding that stipulated in articles 9.2 c) and 10.2 c) of this Law, in relations between the persons concerned and those subject to the scope of this Law, under no circumstances will identification systems based on distributed ledger technologies and signature systems based on them be admissible and, therefore, they will not be authorised, until a specific regulation concerning them has been issued by the Spanish government within the framework of European Union law.
>
> 2. In any case, any identification system based on distributed ledger technology covered by the central government legislation referred to in the previous section must also include that the General State Administration will act as an intermediate authority exercising the functions necessary to guarantee public security."

Once again, the legislator's action is directly linked to matters related to the Government of Catalonia, which had announced a future tender for the so-called electronic self-sovereign identity (SSI) project known as *identiCAT*. Although there is talk of "self-sovereign" identity, we should clarify that the term in this case refers to the fact that it is a tool that allows the public to autonomously manage it, precisely due to using distributed ledger technologies, which in spite of the terminology used should not have been cause for such alarm. In fact, the systems are an important improvement in terms of the protection of personal data because, unlike other alternative systems to the electronic ID card or digital certificates that are currently used (such as the Cl@ve system that the State Administration uses and intends to extend to all Spanish public administrations), they allow the public to identify themselves to third parties without the need for intervention in each case by the public administration as an intermediary for technological verification of digital identity (Alamillo Domingo, 2019; on the possibilities of blockchain in this field, Merchán Murillo, 2019).

Once again, we are faced with a prohibition that, in addition to problems with constitutionality, raises opportunity problems, even more so if one takes into account the existence, at this time, of more than a few initiatives by some public administrations that were already seeking to make use of the possibilities of this technology, for example in recruitment or procurement processes (Pereiro Cárceles, 2019a: 141-154), because although the restriction appears to refer only to the issue of identifying the public, a large part of the advantages that the technology in question may have are connected with the possibility of anonymising offers or applications so that the system may identify them in an agile and automated manner without any additional intervention made by the Public Administration or its bureaucratic services. There are also problems with constitutionality similar to those mentioned concerning necessary authorisation in Additional Provision 6.2 LPAC, introduced by Law-decree in the sense of always imposing the General State Administration as an authority embedded in these processes with the role of ensuring public security. Furthermore, the rule is so open that it may compromise the pseudo-anonymity that self-sovereign identity systems allow, altering their operation and stripping them of many of their advantages (Alamillo Domingo, 2019).

For these reasons, the prohibition creates a risk of blocking the development of these technologies within Spanish administrations, including the many innovative and trailblazing projects concerning public procurement, among others, which some autonomous communities, such as Aragon, are already starting to

implement (Pereiro Cárceles, 2019b). However, note that, in the opinion of some experts, the prohibition is not all-encompassing because it has not restricted the use in blockchain registered transactions of *classic* identification system such as the electronic ID card or others that the State Administration accepts (Alamillo Domingo, 2019). By combining these two technologies, it is thus possible to make use of these tools in some cases, which makes it possible, for example, for projects such as that in Aragon to bear fruit. Since the summer of 2020, this autonomous community has already been awarding public contracts using distributed ledger technologies to speed up procedures.

4 Disproportionate restrictions of rights and guarantees concerning the public's digital activity

Together with the set of restrictions analysed above, which as we have seen are addressed to the public administrations and present different problems, depending on the case, Law-decree 14/2019 also includes regulatory modifications aimed at establishing new controls of the public's digital activity, granting more powers to the State Administration to monitor information exchanges and other accessory actions, in certain cases. This is a part of the regulation in which there are greater problems with constitutionality in my opinion. On the one hand, it must be said that the explanation concerning the extraordinary and urgent need for the measures (which, remember, it attempts to justify with a vague and imprecise reference to "the recent and serious events that have occurred in part of the Spanish territory") makes it particularly difficult to square these events involving public institutions with the need to restrict the scope in which citizens' rights and freedoms are guaranteed. And, in any case, an explanation is lacking concerning the relationship between one aspect and the other in the justification in the Law-decree. Secondly, insofar as the measure contains rules that clearly establish restrictions on fundamental rights, it is questionable whether a law-decree may deal with them. As is well-known, article 86.1 CE prohibits the use of this instrument to affect the duties and freedoms of citizens regulated in title I of the Constitution. These evidently include the right to freedom of expression which, furthermore, is one of the fundamental rights (arts. 14 to 29 CE), the development of which is reserved for organic laws in article 81 CE. And although a degree of permissiveness for affecting fundamental rights is allowed in the doctrine of the Constitutional Court (Muñoz Machado, 2015: 100-101), it is evident that, in this case, the analysis of proportionality to which we referred above reaffirms a critical view (Cotino Hueso, 2020: 17-19). For this reason, since the problem of constitutionality is substantive, even in the case of parliamentary approval of a regulation with this content, the problem would remain, as it excessively affects the essential content of the affected freedoms.

The power granted to the executive (specifically, the Government of Spain through the Ministry of Economic Affairs and Digital Transformation) is particularly intense. It is an even greater and more discretionary power than it already had to control the use and utilisation of electronic communication services and networks that could, potentially, "pose a serious and immediate threat to public order, public safety or national security or when there are certain exceptional circumstances" that may compromise them and intervention is considered necessary. In these cases, the Law-decree makes it possible to adopt measures as extreme as the Government even taking direct control of the electronic communication services and networks in question. Article 6.1 of Law-decree 14/2019 thus modifies article 4.6 of Spanish Law 9/2014 on telecommunications (*Ley 9/2014, general de telecomunicaciones* - LGT) to expand the exceptional powers the central government is recognised as holding to directly take control or intervene in the management of any "electronic communication services and networks", as well as any "infrastructure, associated resource or element or level of the network or the service".

It should be noted that this is a very broad and discretionary legal authorisation, which generously increases the executive's capacity for action based on merely claiming that any of these situations exists (once again, they are totally generic and very freely interpretable). In principle, it is accepted that this may be performed without the need for prior judicial control (although, as is normal, there would be the possibility of *ex post* review) which is unusual in exceptional authorisations for urgent reasons due to so directly affecting fundamental rights, in particular freedom of expression. In addition, these possibilities are not only recognised in relation to a strict concept of a network or communication society service, which may lead to the understanding that it is limited to the provision of more business-related services by service providers

and utility companies. On the contrary, Law-decree expressly establishes that these powers and all of these measures may be extended to any other element that is necessarily associated with them, thus allowing intervention in any infrastructure necessary to provide the services. It makes clear that this may also involve taking control of telecommunication infrastructures. Regarding this issue, and its importance, see Cotino Hueso, 2020: 8-11. In addition, one should remember that these measures not only affect the fundamental right to freedom of enterprise in relation to information society providers or companies that manage such infrastructure, but also indirectly, but very intensely, affect the effective possibilities of action and exercising fundamental rights linked to the expression of ideas and opinions, as well as the dissemination of information, for which these networks and infrastructures are decisive instruments. This latter aspect is not only evident but has also been stressed from a theoretical point of view by a large part of doctrine, compiled in Boix Palop (2002: 133-135 and *passim*). The practical effects of this Decree and its problems are very adequately highlighted in Opinion 6/2019 of the Council for Statutory Guarantees of Catalonia (Legal Ground four 2*b*). One could even consider, as Cotino Hueso does (2020: 26), that an incipient right to internet access arising from freedom of expression could be affected by the regulation.

The problem with the new regulation is not so much the fact that there is a possibility of intervention of this kind, but rather its intensity, shortcomings in the definition and delimitation, the generosity of the powers the administration is recognised as holding and the absence of controls in the moment of decision-making. In fact, it is true that the idea underlying the regulation may not be particularly new in some of its features: the prior versions of the LGT from the first of the regulations regulating the subject matter in 1998, through the 2003 regulation to article 4.6 LGT prior to the reform, all contained provisions for controls in exceptional circumstances precisely as a measure to limit the effects of deregulation of the sector that could pose a risk by disempowering the public powers in certain crisis situations. This origin of the regulation and its limited nature were very clearly evident in the fact that the intervention was linked to breach of public service obligations, more than the existence of a public interest in jeopardy. The new version approved by Law-decree 14/2019, however, implies a substantial change, as very convincingly explained by Cotino (2020: 6-8) because it seeks to directly grant the executive the ability to contain the use of networks and public communications in situations of protest and public criticism. In fact, the very reference in the preamble to "serious events" that would justify the need for the reform approved through a law-decree would, paradoxically, reinforce this conclusion. A similar consideration that the objectives of the legislative authorisation have changed and go beyond public control powers in crisis situations, posing a danger of controlling digital public opinion, is also expressed in Opinion 6/2019 of the Council for Statutory Guarantees of Catalonia (Legal Ground four 2*b*).

In addition, in order to guarantee compliance, in addition to this vast authorisation to take executive decisions for reasons of public order, public safety and national security without practically any checks and balances or control, the Law-decree adds a series of new penalty powers in the hands of the Ministry of Economic Affairs and Digital Transformation against service providers that breach the requests or orders that may be issued to execute these instructions.

This whole set of new rules, the intensity of which is notable due to the fact that they authorise the government to control and even cut off communication considered to endanger the public interest directly and without prior judicial control, means that we face a problem of possible material unconstitutionality. The generality and breadth of the powers attributed to the government, the potential capacity for control of communication systems and networks, in all fields, including telephone, internet, messaging and social networks, etc. may result in complete control, with the risks that poses, as correctly pointed out in Opinion 6/2019 of the Council for Statutory Guarantees of Catalonia (Legal Ground four 2*b*). It is now not a possible invasion of autonomous communities' powers, which the Constitutional Court has repeatedly made clear would not be the case since it is a clear central government power (Constitutional Court Judgment 72/2014; 20/2016), but instead material unconstitutionality due to not adequately respecting the essential contents of certain fundamental rights, freedom of expression in this case. There is no doubt that with this legal framework, in some way, an emergency law is being introduced concerning electronic communication that, firstly, could go against the provisions concerning censorship which, as is well-known, in the Spanish Constitution (art. 20.5 CE), require the intervention of a judge to seize content. Neither prior censorship nor government control of content is allowed in any case. This is a provision that we must interpret, as stated by the Constitutional Court, in the sense of deeming any restriction by the executive with equivalent effects

unconstitutional (Boix Palop, 2002: 166-171, citing Sánchez Almeida i Maestre in an online paper that can no longer be found, which clearly clarifies the initial constitutional case law concerning prior censorship). Secondly, moreover, there is no justification for a differentiated framework for electronic communications that makes something admissible for these that would not be for analogue communications. This infringes the constitutional precepts that guarantee identical protection in one field or another. Lastly, in spite of the references to national security, the defence of public order or other equivalent interests being able to make certain guarantees and rights more flexible, under no circumstances is it possible to distort the protection of the public guaranteed by fundamental rights, the constitutional content of which must be preserved in all cases (de Otto, 1988: 103-107 and 110-124) and under no circumstances may it be distorted based on an interpretation that imposes disproportionate limitations or restrictions on them (Revenga Sánchez, 2002) according to the dominant form of legal reasoning imposed in recent years by international and European courts (from the European Court of Human Rights to the Court of Justice of the European Union). Based on these three types of considerations, the legal weaknesses in the new regulation are clear to see.

Lastly, Law-decree 14/2019 strengthens the executive's role in issues of control and limitations of freedom of expression which, while they already existed in some fields, had also already been criticised (Betancor Rodríguez, 2007; Boix Palop, 2014: 78-80). While the approved regulation is protected by the appeal to exceptional circumstances and security risks, it ends up constructing a legal framework of government control of content and the ability to remove it and totally control digital communications in a highly invasive manner.

It is a very intense control system, which may also allow the government to effectively silence opinions and information. Based on a classic understanding of the Spanish Constitution, this would have been clearly unconstitutional if it had been intended to affect communications conducted through other means. Hence, it does not appear reasonable for it to be considered possible for opinion and expression of ideas in digital spheres. This opinion is increasingly supported by doctrine in our country (García Morales, 2013; Boix Palop, 2016: 102-105; Doménech Pascual; Cotino Hueso, 2020: 27-29) and furthermore was at the centre of the change in the intervention model in countries such as France, which shifted from purely administrative control to judicial control when ordering internet shutdowns, for this very reason.[6]

The regulation contained in the Law-decree, which has been challenged by Catalonia and the Basque country, will force the Constitutional Court to establish definitive doctrine concerning the issue, which will have to clarify whether the classic and traditional guarantees should be applied to these environments as appears to be inferable from established constitutional doctrine and case law. If that is the case, all of these provisions would have to be declared unconstitutional, at the very least due to the absence of judicial intervention in actions that determine an absolute shutdown in means of communication and spreading information or interpersonal communication mechanisms which, as we have seen, may be very general in nature.

5 Conclusions

Following a legal analysis of the modifications introduced by Law-decree 14/2019 in the Spanish legal system, we find that this is a good example of the problems caused by legislation reacting to more political than regulatory or technological problems. Just as there is a tendency to recommend not falling into *punitive populism* by reforming the Criminal Code in response to news stories with great social impact, we should also take care to extend a prudent attitude to certain legal and administrative reforms that, when rushed through in response to circumstances such as the Catalan conflict, lead to the general introduction into the legal system of rules applicable to all public administrations that contribute almost nothing of value. In part, precisely in order to prevent this from happening, our system establishes theoretical restrictions on the use of regulatory instruments such as decrees-law, which by definition are less thought through than those which go through the ordinary parliamentary channels, and so are allowed in the Constitution as an exceptional possibility. The trivialisation of their use for the reasons we have analysed makes it easy to pass regulatory reactions that are not sufficiently thought out.

6 Regarding the decision of the French *Cour Constitutionnelle*, which declares shutdowns illegal when they are ordered only by governmental bodies, also see the author's corresponding blog post.

Law-decree 14/2020 is not only possibly unconstitutional due to not being authorised for a true "extraordinary and urgent need", but also presents problems of opportunity that are easily detectable and, more seriously still, contains rather important defects in its material constitutionality. An example of the former is not so much the rules concerning contracting and personal data that it also contains (which we have not referred to since they do not pose problems due to their topical and repetitive nature) as the restrictions on the public administrations making use of technological solutions that exist in the market (cloud storage and the like in the new articles 9.3 and 10.3 LPAC; and certain facets of distributed ledger technologies restricted in Additional Provision 6.1 LPAC), which on occasions may be very useful and in no way pose a problem in and of themselves.

Two serious problems with constitutionality that appear in the regulation, in my opinion, are paradigmatic of the latter. The first has to do with the appearance of new controls by the State Administration on technology and decisions concerning how to implement the adaptation of the administration to current needs and electronic means, in the form of authorisations from the State Administration to allow others to make use of certain technical solutions (arts. 9.2 c) and 10.2 c) LPAC) and the State Administration's intervention if another administration intends to make use of blockchain (Additional Provision 6.2 LPAC). In both cases, we are dealing with new examples of how the central government is taking advantage of the transition to electronic administration to limit the effective autonomy of local bodies or autonomous communities by controlling the applications and technological solutions employed. This clearly affects their capacity for self-organisation in the same way as was attempted in the recent past, which the Constitutional Court has already considered inadequate (Constitutional Court Judgment 55/2018, Legal Ground 11).

The second problem, which is also rather serious and more directly and immediately affects the public, is the establishing of measures that allow a notable increase in the effective capacity of the executive (the Spanish Government, in this case) for control of digital communications and the services and infrastructure that make it possible. These measures allow the total shutdown of communications, filtering of messages and content, or taking control of infrastructure and service providers with legal authorisation that is too broad, imprecise and unspecific. These measures also make it possible to effectively control and censor the flow of information and although there may be reasons of public interest or national security justifying the need for an intervention of this kind, according to article 20.5 of the Spanish Constitution this should not be done through ordinary legislation without judicial intervention outside of states of exception or siege. This is a further manifestation of a tendency that, for at least a decade, has been leading us to growing administrative intervention and capacity to control communications that, in my opinion, is incompatible with our constitutional model, which clearly establishes that control of inadequate manifestations of expression is in the hands of the judiciary, still more so when it is performed previously, as is made possible in this case, since it is equivalent to prior censorship.

In any case, we will have to wait for the Constitutional Court to take advantage of the appeals lodged to lay down case law on at least these two questions. In my opinion, it is essential for the highest Spanish court to establish definitive doctrine concerning administrative interventions in the exercising of freedom of expression and its limits. In particular, I think it is important to rule on the constitutionality of the administration's ability to shut down communications between citizens without any kind of judicial intervention and the appeals lodged should give it an opportunity to do so in a more general manner. Likewise, the court will have to clarify and perhaps generally establish its doctrine concerning the unconstitutionality of certain controls and authorisations by the State Administration affecting other public administrations that enjoy autonomy. These interventions, which are increasingly intense and frequent, tend to be justified on grounds of necessary interoperability or the search for greater efficiency in relation to the implementation of new technological solutions. The Constitutional Court would have to explain whether or not they are sufficient reasons to undermine the constitutional principle of autonomy.

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